No. 3102

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL CARBON COMPANY,
Appellant,

vs.

ALASKA STEAMSHIP COMPANY,
(a corporation),
Appellee.

REPLY BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO.

Index to Cases Cited.

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The appellee seems to rely in its brief on the theory that the master of the "Eureka" used his discretion as to how long the "Eureka" should wait at Colon. The fact is, however, that the master did not use his discretion, but acted under the orders which he received from Kurz of Rubelli's at Philadelphia. If the court will read the various cables which were received and sent by the master of the "Eureka", we believe that it will be convinced that we are correct. If we are correct the appellee's whole defense fails. The first cable sent by Baggott, the master of the "Eureka" was the following—Libellant's exhibits 43 and 43A:

"Rubelli
Philadelphia
Arrived all right September 28th do not expect to leave before October 10th. Further information cannot be obtained. Looks very bad. *Advise you* consult Washington.

Baggott".
(Italics are our own.)

The next cable, libellant's exhibit 49, was also addressed to Rubelli at Philadelphia. The next cable, libellant's exhibit 53, dated October 11th, is addressed to Rubelli at Philadelphia. The next cable, libellant's exhibit 54, received October 11th by Rubelli's at Philadelphia from Captain Baggott is in the following language:

"Rubelli Colon
Philadelphia
Referring to your telegram of the 11th official information will be given out tomorrow morning Canal will not open November 1st informed will be advised (advisable) do not wait any longer. *Would advise you to discharge cargo here transship cargo to Pacific port* Send us back for another load. It will take about seventy days via Straits of Magellan.

Baggott".
(Italics are our own.)

Note * * * If the master were acting on his own discretion he would have discharged the cargo at Colon on October 11th, as he knew at that time that it was useless to wait longer. But what does he do? He

merely gives Rubelli's his opinion and leaves it to their judgment as to what to do.

On October 15th, Baggott sent Rubelli's the following cable:

"Rubelli Colon
Philadelphia
Following information is from a reliable informant Canal probably will not be open before January First This information is confidential I cannot mention name of my informant There is every reason to believe the information is correct Impossible to obtain definite information".
Baggott
Oct. 15 1915."

Note * * * If the master were exercising his own discretion, is there any doubt that he would leave Colon on October 15th at the time when he sent this cable?

The next cable, libellant's exhibit 71, is dated October 29th, sent by Charles Kurz to Baggott, authorizing Baggott to make arrangements for transshipping the cargo. This cable is sent from Portland, Oregon, and is signed "Charles Kurz".

Note * * * If the master had authority to make such arrangements, how unnecessary was this cable!

On November 3rd, Kurz cabled Baggott, libellant's exhibit 72, inquiring whether he had been able to make the arrangements proposed. Baggott, on November 4th, libellant's exhibit 73, cabled in reply:

> "Kurz, Portland.
> Start Will not agree to your proposal Can sail tomorrow morning for New Orleans *Telegraph instructions* who are your agents at New Orleans.
> Baggott".
> (Italics are our own.)

If as is stated in the brief for the appellee the master was exercising his own discretion, why does he ask Kurz to telegraph instructions?

It was in reply to this cable that Kurz sent the cable (libellant's exhibit 74), which was referred to in our principal brief, directing Baggott to proceed to New Orleans. We have already pointed out that the District Court misread this cable. Appellee's counsel suggests that the cable was not misread by the District Judge, but that the District Judge's stenographer made an error in transcribing the cable in the court's opinion. If the District Judge did not misread the cable, why did he say:

> "This telegram I interpret as from both the Oregon-California Shipping Co. and Mr. Kurz, as the representative of L. Rubelli's Sons".
> (Opinion p. 73.)

It is to be noted that the "Eureka" did not leave Colon until Baggott received this cable from Kurz signed by him only, instructing him to do so.

It is submitted that this documentary evidence shows conclusively that the master did not exercise *his discretion* as to the length of time that the "Eureka" should wait at Colon but that the only person who exercised such a discretion was Kurz of Rubelli's.

The appellee also contends that the libellant made no complaint in the District Court nor did it argue in the District Court that the "Eureka" should be liable for her unreasonable delay. On pages 40 to 49 of our brief in the Court below the matter of the unreasonable delay of the "Eureka" was made the subject of a special section and was designated "Point IV". A copy of this brief was served on counsel for the appellee when the case was before the District Court and the original copy is now or should be with the District Court. In order to direct this court's attention to the argument made in the court below, we have printed the section in question as an appendix to this brief. It will be found that the language used by us in making our argument before the District Court is identically the same language as that of the brief which we have filed in this court. In face of this evidence can there be any doubt that the point was raised and fully discussed in the District Court?

Moreover, since the decision of *Reid v. Fargo,* 241 U. S. 544, 548, it is established that an appeal in Admiralty is a trial *de novo* and that the appellate court can review the entire case.

The law has been settled since the case of *Clark v. Barnwell,* 12 How. 272, that in a suit in Admiralty against the carrier for failure to carry, all that need be alleged in the libel is that the goods were delivered to the carrier in good order and condition and were delivered by the carrier in bad order and condition. In *Clark v. Barnwell,* supra on page 280, the Supreme Court of the United States said:

"After the damage to the goods, therefor, has been established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; for, then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence, and inattention to duty".

In the present case the libellant alleges, record pages 7 and 8, that they delivered the goods to the vessel in good order and condition, and on page 10, that after a lapse of several weeks after the requests and demands of the libellant had been made, the cargo was delivered to the libellant in bad order and condition. This libel is drawn in accordance with the practice which has prevailed ever since the decision of *Clark v. Barnwell, supra.*

In *Dupont v. Vance,* 19 How. 162, the Supreme Court had before it a case where a libel had been filed for non-delivery of cargo. The defense of peril of the sea was set up and the court held that the cargo was lost as a result of peril of the sea. Notwithstanding the fact that no claim had been made in the libel for a general average contribution from the vessel the court allowed a recovery of such a contribution.

The *St. Quentin,* 162 Fed. 883, upon which the libellant so strongly relies, is distinguishable from the case which we now have under consideration. That was a case which did not involve delay, but ordinary heating of cargo in a vessel's hold. If the court will read the reported opinion in that case, it will observe that the heating occurred while the ship was passing through the Red Sea in the ordinary course of her voyage. As pointed out in the case of *The Indrapura,* 171 Fed. 929, cited in our principal brief, an unwarranted delay constitutes a deviation, and that when a vessel has deviated from her voyage she is no longer entitled to the benefit of the exceptions contained in the bill of lading.

We pointed out in our principal brief that the heating of the "Eureka's" cargo was the result of a delay which was occasioned by a dispute between the owners of the "Eureka" and the Oregon-California Shipping Co., her charterers (see a letter addressed to Rubelli's by the Oregon-California Shipping Company, page 33 of our brief). The following excerpt from claimant's exhibit K also shows that the delay at Colon was the result of such a situation:

> "So we will only ask you to help us bring about a solution of the matter. Should we discharge this cargo at Colon under the present conditions, *it would possibly serve to relax the energies of the Crossett Western Lumber Co.* and we do not care to take it upon ourselves to be responsible without any chance of gain when the Crossett Western Lumber Co. is holding the bag".

It is believed that the evidence shows overwhelmingly that the cause of the "Eureka's" delay was iden-

tical with the cause of the delay in *The Covetina,* 52 Fed. 156, viz. a dispute between charterers and owners.

The appellee says the proximate cause of the damage to appellant's goods was not the delay, but the slide in the Canal. We submit the evidence shows conclusively that this was not the fact but that the cargo was damaged by heat because of the long delay of the vessel at Colon. It is to be noted that no effort was made by the appellee to rebut this evidence.

Appellee also argues that the letter of October 25th (libellant's exhibit 17) shows that Mr. Mitchell knew that Rubelli's was not the agent of the Oregon-California Shipping Company. If the court will read the letter referred to, it will find that the first part of the letter is as follows:

> "Oregon California Shipping Co.
> Railway Exchange Bldg. Portland, Ore.
> Confirming notice to your *agents Rubelli,* Philadelphia, in person October ninth, by telephone October fourteenth."
>
> (Italics are our own.)

It is submitted that so far from showing that Mitchell did not regard Rubelli's as agents of the Oregon-California Shipping Company, the letter shows conclusively that Mitchell described Rubelli's as the agent of the Oregon-California Shipping Co. The record may be searched in vain for an answer from the Oregon-California Shipping Company, denying that Rubelli's was its agent.

Appellee also says that it was impossible to discharge the cargo at Panama. There is no proof in the record to this effect. On the contrary Mr. Mitchell has testified that he could have made arrangements to bring the cargo back from Panama to New York. It is to be remembered that when the ship arrived at New Orleans that Mitchell took possession of his goods there. He did not send his goods to the Pacific Coast, but the brought them back to New York for the purpose of reconditioning them.

Appellee also makes much of the fact that Kurz was called as a witness by the appellant. If the court will examine the record at page 3, it will find that the appellee served notice on the libellant that it intended to take the testimony of R. H. Baggott, H. M. Williams and Charles Kurz. It was not until the appellee failed to take Kurz's testimony that the appellant did so. We do not understand the rule of evidence to be that a party who calls a witness cannot attack the conclusions drawn by that witness as to his relations with other parties. As we understand the rule it merely provides that when a party calls a witness, he cannot impeach him or attack his credibility. We have not attacked the credibility of Mr. Kurz nor are we seeking to do so. We are merely pointing out that when he says that he was acting merely as soliciting freight agent, his conclusion as to his legal relation with the Oregon-California Shipping Company does not square with the facts as shown by documentary proof secured from him.

In *McLean v. Clark,* 31 Fed. 501, Judge Henry B. Brown (afterwards of the Supreme Court of the United States) said:

> "While it is undoubtedly true, as a general rule, that a party offering a witness in support of his case represents him as worthy of belief, and will not be permitted to impeach his general reputation for truth, or impugn his credibility by general evidence, he has never been considered as bound by his general statements as to motives or intention, or his bona fides in a particular transaction, but may draw any inference from his testimony which the facts stated by the witness seem to justify".

The appellee has also attempted to make much of the fact that Mr. Mitchell was seeking to have his goods forwarded to California and that, therefore, Mitchell's testimony as to the demand for delivery of his goods at Colon should be viewed with suspicion. If the court will read the record, it will find that the testimony of Mr. Mitchell is absolutely supported by Kurz. Kurz states without qualification that Mr. Mitchell did demand that his goods be delivered to him at Colon. It appears from libellant's exhibit 66, a telegram dated October 18th, that Kurz informed the Oregon-California Shipping Company that the National Carbon Company offered to pay all expenses of discharging, including loading back on board any other goods, in order to forward their goods from Colon. If this offer made by the National Carbon Company contemplated any other arrangement than that which has been testified to by both Mr. Mitchell and Mr. Kurz,

the appellee certainly could have secured some proof to substantiate its contention from Mr. Williams, the other person who was familiar with the entire transaction. It is to be noted that the appellee has failed to call Mr. Williams to testify, although it served appellant with notice that he intended to take Mr. Williams' deposition (see the record page 3). If there is any ground for regarding either party with suspicion, the party who has failed to produce any proof is the party who should be regarded with suspicion. See the case of *The Gladys*, 144 Fed. 653-655, where the court says:

> "So far from showing that extraordinary care was exercised by those in charge of the navigation, the owner of the tug and tows (the whole flotilla belonged to the railroad company) has not called a single witness from the Carlisle, neither navigator, wheelsman, lookout, or deckhand. This circumstance, in itself would seem to be sufficient to warrant the conclusion that whatever might have been the errors of others, she at least was in fault".

Aside from the foregoing, may we ask what else Mr. Mitchell could do but to use his best endeavors to have his goods forwarded, when Kurz, the man who was directing the movements of the "Eureka" and the man whom, as we have shown, was exercising that discretion which the appellee argues so strenuously should be exercised by the master, refused to deliver his goods to him. The goods were perishable. Naturally Mitchell would leave no stone unturned to pre-

vent their destruction. When Kurz arbitrarily refused to deliver them to him he did the next best thing, namely, he attempted to have the appellee get them away from Colon. The fact that Mr. Mitchell was entirely sincere in his demand for his goods because of their perishable nature is demonstrated beyond controversy by the fact that when the goods were discharged from the "Eureka" at New Orleans, he went there and took possession of them and returned them at once to New York.

The appellee also suggests that because in the case of *The Martha,* 35 Fed. 313, a tender was made of a general average bond, that that case can be distinguished from this case. We submit that there is no such distinction. In *The Martha* case, the vessel's machinery broke down and she put into a port of refuge, hence, large general average expenses were incurred. In this case there has not been the slightest suggestion that general average expenses were incurred at Colon. There was no sacrifice for the common benefit; there was no loss of a general average nature. It is significant that, when the goods were finally delivered at New Orleans, there was no suggestion that there had been a general average loss. No general average bond was demanded there and there has been no suggestion of a general average adjustment. It would have been futile, therefore, for Mr. Mitchell to have tendered a general average bond.

Counsel also says that it was known that there would be a long detention in *The Martha* case and that, in this case, the master was hoping against hope until Novem-

ber 4th that the Canal would be opened, when finally he exercised his discretion to return to New Orleans. We have shown from the master's own cables that he did no such thing; that he waited at Colon for orders from Kurz, the man upon whom Mitchell made his demand. The master knew as early as October 11th, nearly a full month before he received orders from Kurz to go to New Orleans, that there was no hope of passing through the Canal. In this case, therefore, the master knew on October 11th that there would be a *long delay* at Colon.

It is also stated in appellee's brief that the demand in *The Martha* case was made on the owner. If the court will read *The Martha* case it will observe that demand was made on the owner

"through his agent in New York".

We submit that when a shipowner or charterer elects for his own benefit to keep perishable cargo in the hold of a vessel in the tropics for his own benefit and in the face of the protests and demands of the cargo owner, he should be compelled to bear the consequences.

Respectfully submitted,

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(APPENDIX FOLLOWS.)

APPENDIX.

(Point IV of libellant's brief filed in the District Court.)

Point IV.

THE DELAY OF THE STEAMER AT COLON WAS UNWARRANTED.

It is well settled that a vessel with perishable cargo on board is responsible for damage caused by unwarranted delay:

The Queen, 28 Fed. Rep. 755;

The Coventina, 52 Fed. Rep. 156;

Schwarzschild v. National Steamship Co., 74 Fed. 257;

Propeller Niagara, 21 How. 7;

The Gutenfels, 170 Fed. Rep. 937.

In *The Coventina* the court said:

> "So here, when it was found that this ship had been seized and could not be released, except at great risk to the owners, until the end of an uncertain litigation, *reasonable consideration of the shipper's interests required either that the goods should be transhipped to their destination by some other vessel, or else that the shipper should be notified of the liability to delay, and the privilege given him to reship at his option. In default of this the ship took on herself the risk of loss by delay,* with the right of recourse to the charterers for indemnity."

The Supreme Court, in *Propeller Niagara* (21 How. 7) said (p. 27):

> "Safe custody is as much the duty of the carrier as conveyance and delivery, and when he is unable to carry the goods forward to their place of des-

tination from causes which he did not produce and over which he had no control, as by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence. An effort was made by able counsel in King vs. Sheperd, 3 Story; (C. C.) 388, to maintain the proposition assumed by the respondents in this case, that the duties of a carrier after the ship was wrecked or stranded were varied, and therefore that he was exempted from all liability, except for reasonable diligence and care in his endeavors to save the property. Judge Story refused to sanction this doctrine and held that his obligation, liabilities and duties as a common carrier still continued and that he was bound to show that no human diligence, skill or care could save the property from being lost by the disaster. Anything short of that requirement would be inconsistent with the nature of the original undertaking and the meaning of the contract as universally understood in the courts of justice."

See, also, *The Maggie Hammond,* 9 Wall. 435.

As early as October 12th (libellant's exhibit "59"), the steamship company was informed by Rubelli that the Canal would not be open on November 1st, and that it was impossible to say when it would be opened. After that time telegram after telegram was sent it urging that something be done with the steamer and her cargo. No orders were given to the master of the "Eureka" to proceed until November 4th (libellant's exhibit "54"). The only excuse for this delay is contained in Libellant's Exhibit "47", a telegram from

Oregon-California Shipping Co., Inc., addressed to Rubelli. That telegram is as follows:

> "*Do not make arrangements to transfer Eureka cargo as owners will not permit us to place ship on Atlantic trade* stop. Our best legal talents pronounce slides act of God and state we are exempt from payment during detention what is your opinion see section three Act of Congress February thirteenth eighteen ninety three."

As was said by the court, in the case of *The Coventina,* 52 Fed. Rep. 150, cited above, the owner of the cargo was not interested in the dispute between charterer and owner as to the trade in which the ship should be used. The ship was bound to the goods to fulfill her contract of affreightment. Knowing as they did the character of the cargo (and the Oregon-California Shipping Co., Inc., knew this as well as Kurz. See National Carbon Company's telegram of October 18th to Oregon-California Shipping Co., Inc., informing it of the perishable nature of the cargo) it was the duty of the Oregon-California Shipping Co., Inc., to either deliver the cargo *at once* to the National Carbon Company in accordance with its demand, or to bring the ship to some port where proper transhipment arrangement could be made. It certainly had no right to delay until November 4th before making a decision merely because the owners of the vessel would not permit her to be used in the Atlantic trade. It should have discharged the cargo at once at Colon or it should have brought the steamer forthwith to some American port where the cargo could be discharged.

The court will observe from an examination of libellant's exhibits 45 and 46, that respondents knew as early as October 5th, that no arrangement could be made for the transhipment at Panama. Under these circumstances, what possible excuse can there be for waiting a full month at Panama before making the decision to bring the vessel to New Orleans?

The claimant takes the position that the libellant is not entitled to recover damages because the delay in delivery after libelant's demand for delivery at Colon, was expressly exempted by the bill of lading.

The cases which we have cited above show conclusively that the bill of lading exemption does not refer to such a delay. The only delay which a carrier can legally exempt himself from is an unavoidable delay. The delay in delivery of the goods was not unavoidable but was for the purpose to permit the owners and charterers to come to some decision as to the future use of the vessel. The telegrams passing between the Oregon-Shipping Co. Inc. and Rubelli establish this fact. Should libellant suffer because of the delay in reaching a decision?

The claimant further says that the damage was not the natural and proximate cause of the refusal to deliver. The testimony of the libellant conclusively shows that it was. This testimony has not been rebutted.

It is obvious that the cargo at Colon was damaged by heat. Libellant's witnesses have testified that the longer the vessel remained at Colon the worse the heat in the holds became. Obviously toward the end of the

time the vessel was lying at Panama the deterioration from heat became a real danger. If the vessel had left Colon when it was known that the cargo could not be transhipped, libellant's witnesses testify that there would have been no damage.

The case of *St. Quentin,* cited by our opponents, refers to an entirely different state of facts. That was not a case of refusal to deliver cargo on demand. It was a case of damage to cargo caused by heat while the ship was proceeding on her voyage through the Red Sea. In the present case the vessel was at rest (see Coxon's testimony as to the increase of heat in a ship's hold while she is at rest). There was no unwarranted delay in the *St. Quentin* case. An unwarranted delay constitutes a deviation (*The Indrapura,* 171 Fed. 929, 932). In cases of deviation a carrier is not entitled to the benefit of bill of lading provisions *(Globe Nav. Co. v. Russ Lumber & Mill Co.,* 167 Fed. 228).

All of the items of damage claimed with the exception of the claim for freight, amounting to one thousand, three hundred, twelve and 66/100 ($1,312.66) dollars, freight paid from Cleveland, Ohio, to California for replacement of the cells, we unhesitatingly say are proper items of damage.

The item of two thousand, eight hundred twenty-two and 13/100 ($2,822.13) dollars represented the actual deterioration in the goods after they were reconditioned. There can be no question of this item.

Item four hundred one and 43/100 ($401.43) dollars was part of the reconditioning cost of the goods. The goods could not be reconditioned in New Orleans and

had to be brought to Jersey City for that purpose, hence the freight paid to bring them from New Orleans to New York was an unavoidable reconditioning expense.

The same may be said of the expenses of Mr. Mitchell, two hundred sixty-one and 81/100 ($261.81) dollars, for proceeding to New Orleans and four hundred fourteen and no/100 ($414.00) dollars, his expenditures in New Orleans to put the cells in such condition that they could be transported to Jersey City. A reading of the testimony will convince the court that Mr. Mitchell's presence in New Orleans was absolutely necessary to insure proper handling of the damaged goods. Likewise, the cost of telegrams, one hundred thirty-seven and 81/100 ($137.81) was an essential item of expense. The loss in the market value of the goods due to the decline in price is also a proper element of damage (see the last paragraph in *Swift v. Furness, Withy & Co.*, 84 Fed. Rep. 345, 349). If the goods had been delivered when first demanded they could have been brought to New York and there sold before the market declined.

And see *The City of Para*, 44 Fed. 689, 691, where the court says:

> "The damages provable against the fund will include the loss of the perishable cargo, made worthless by the delay and thrown overboard, as well as the partial damage to what was brought into port; and also all the costs and charges attending the salvage of the cargo,—that is to say, its proper proportion of the aggregate cost and charges up to the time of its arrival here, as well as any further damage, if any, by reason of any difference in

market price from the delay in arrival. *The Giulio,* 34 Fed. 909; *The Belgenland,* 36 Fed. 504; *The Caledonia,* 43 Fed. 681."

As we have said before, we have some doubt as to whether the libellant is entitled to recover one thousand, three hundred twelve and 66/100 ($1,312.66) dollars, extra freight which he paid to carry the cells which he substituted for those which were damaged, from Cleveland to California.

We therefore submit that a decree should be entered in this cause against the claimant for the sum of four thousand, nine hundred fifty-three and 08/100 ($4953.08) dollars with interest and costs.

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